IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26.02.2008

Coram:-

The Honourable Mr. Justice P.D.DINAKARAN
and
The Honourable Mr. Justice R.REGUPATHI

H.C.P. No.585 of 2004

A.T. Maideen ... Petitioner

vs.

1. The State of Tamil Nadu
rep. by the Secretary to the Government,
Public (Law & Order) Department,
Fort St. George,
Chennai 600 009.

2. The Union of India
rep. by the Secretary to the Government,
Ministry of Finance,
Department of Revenue (COFEPOSA Unit),
Janapath Bhavan, VI Floor, 'B' Wing,
Janpath, New Delhi 110 001.

3. The Superintendent of
Central Prison,
Central Prison, Chennai 600 003. ... Respondents

Petition under Article 226 of the Constitution of India for the issuance of a writ of Habeas Corpus to call for the records relating to the detention order passed in G.O. No.SR.I/633-4/2003, Public (SC) Department, dated 22.05.2003, passed by the first respondent, quash the same and direct the respondents to produce the body of the person of the detenu A.T. Maideen, son of A.L.Ahamed Thambi, now detained in the Central Prison as COFEPOSA detenu before court and set him at liberty.

For Petitioner : Mr. M.M.K. Alifudeen
For R1 & R3 : Mr.N.R.Elango,
Addl. Public Prosecutor.
For R-2 : Mr.K.Gunasekar,
Addl. Central Govt. Standing Counsel.

J U D G M E N T

P.D.DINAKARAN, J.

The petitioner herein, who has been clamped with an order of detention dated 22.05.2003 passed by the first respondent under the provisions of Sec.3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "COFEPOSA") with a view to prevent him from indulging in smuggling activities in future, challenges the validity of such order in this habeas corpus petition.

2. The present petition is the second round of contest before this Court, questioning the validity of the impugned detention order.
3. Inasmuch as the earlier Habeas Corpus Petition filed by the petitioner was dismissed by a Division Bench of this court by a detailed order dated 18.02.2004 in HCP No.908 of 2003, elaborately dealing with the various contentions projected on the side of the petitioner, we deem it useful to refer in brief the crux of the order passed by the Division Bench after highlighting the factual aspects which ultimately led to passing of the detention order and then proceed to discuss the points/grounds raised by the petitioner in an endeavour to beset the order of detention.

4. The factual aspects based on which the ultimate detention order came to be passed are narrated below in a compact manner:-

(i) The officers of the Directorate of Revenue Intelligence (DRI), on receipt of intelligence information, came to know that red sanders (prohibited wood) were being exported as popcorn maize under Shipping Bill No.1585090, dated 25.04.2003, filed in the name of M/s. Vatchala Enterprises and that the detenu and one Abdul Lasa were concerned in the said illicit export.

(ii) Consequent thereto, the DRI officials located the container covered by the said shipping bill, which was loaded on the trailer inside the Container Terminal at the Chennai Harbour on 26.04.2003 and the same was detained.

(iii) The container was examined at Bharathi Dock Yard of Chennai Harbour in the presence of independent witnesses and also in the presence of
(a) R. Adhikesavan, Proprietor of M/s. Vatchala Enterprises, Chennai, and Custom House Agent (CHA), M/s. Fame Shipping Agency, Chennai;
(b) S. Chengalvarayan, owner-cum-driver of the concerned trailer;
(c) B. Lenin of Container Agent M/s. Goodrich Maritime, Chennai;
(d) Balaji, Manager of Numbal A.S. Shipping Agencies (P) Limited;
(e) B.Prabhakar, Forester, Forest Protection Squad, Chennai; and
the officers of the Customs Department.

(iv) In the shipping bill, the name of the consignee was mentioned to be M/s. Golden Global Impex Pte. Ltd. at Singapore and the declared consignment was 400 bags of popcorn maize, weighing 25 Kgs. each. The container was despatched after clearance by the Customs Authorities at Numbal CFS on 26.04.2003 and thereafter it arrived Chennai Harbour by an identified trailer.

(v) On examination, it was found that though the Customs seal and the seal of M/s. Goodrich Maritime were found intact, one of the latches of the container was found to be tampered and on further examination of the container by cutting open the seals, it was found to contain 205 gunny bags containing reddish wooden logs, a scheduled timber, of different sizes and some popcorn maize spilled on the floor of the container. The reddish wooden logs were confirmed as being red sanders.

(vi) During enquiry, the Proprietor of M/s.Vatchala Enterprises, Chennai, and the Customs House Agent stated that he was not the actual owner of the goods but he had lent his company's name and the IMPEX Code for the export of popcorn maize for monetary consideration. According to him, one

Thiru.Kaleel had approached him and mediated for the said export.

(vii) The owner of the trailer stated that one Abdul Lasa had met him at Numbal CFS and paid a sum of Rs.1,000/- towards diesel expenses for the transport of export-cargo from Numbal CFS to Chennai Port and the balance amount would be paid by the detenu, who was the owner of the consignment.

(viii) Red sanders, weighing about 10.475 MTs., were seized by the officers of DRI under a mahazar as the same being prohibited items for export, re-packed, kept in the same container and subsequently handed over to the authority for safe custody. The broken lock and the Goodrich Seal were also seized. Thereafter, search was conducted in the residential premises of the detenu on 27.04.2003, during which time, it was found that a sum of Rs.8,00,000/- in Indian Currency was kept inside the cupboard in the bedroom. The detenu, in the presence of some independent witnesses, stated that the said sum was part of the sale proceeds of the red sanders consignment exported under the guise of export of Popcorn Maize in March 2003. The said sum of Rs.8,00,000/- was also seized.

(ix) Following the same, another search was conducted by the DRI Officials in the office premises of the detenu in presence of the independent witnesses as also in presence of Abdul Lasa, Manager of M/s.Genexpo Trading (P) Ltd., Chennai, and during such course, two keys were found. Abdul Lasa stated that the said keys were of the godowns at Puzhal where the declared export cargo, viz., Popcorn Maize, was destuffed and the red sanders were stuffed in the above said container. Those keys were also seized.

(x) Thereafter, in the godown at Ambattur, identified by Abdul Lasa, search was conducted and 400 gunny bags were found containing popcorn maize. On enquiry, Abdul Lasa informed that the said gunny bags were the declared cargo of the above said shipping bill, which were removed on the previous day from the container and substituted by the red sanders, which were earlier available in the godown.

(xi) The owner of the trailer gave a statement that at the instance of one Khan Bhai, one empty container was transported from Sanco CFS to Numbal CFS in his trailer and on 26.04.2003 popcorn maize was loaded whereupon Abdul Lasa came there and gave Rs.1,000/- to Khan Bhai for diesel expenses. According to the owner of the Trailer, when the container was being moved to Chennai Harbour, a lean, black and medium height person also came in the trailer, which was driven by Khan Bhai, and at the instance of the said person, the trailer was stopped near Kolathur Double Lake on the Puzhal road and thereafter they went for food and when they returned back, the trailer was not there and after half-an-hour, another driver brought the trailer and thereafter, they reached the Chennai Harbour. When he asked Abdul Lasa for the balance amount, he was informed that the goods belonged to the detenu and that the detenu would pay the balance.

(xii) The authorities got the clue from the statement of Adhikesavan that he had lent his company□s name and the IMPEX Code for a monetary consideration of Rs.5,000/- to Khaleel at the instance of one Arokiasamy, a broker and, as per the arrangement, it was decided to send an empty container to Numbal CFS with a clerk; that Khaleel□s company would bring the popcorn maize for stuffing at Numbal CFS; that M/s. Fame would handle the CHA work and their clerk would take up the processing of papers and stuffing of container at the CFS and would be there till the container was stuffed and sealed; and that, after completion of the paper work, the stuffed container would be handed over to the transporter arranged by Khaleel, who would take care of the transportation of the container to the Port and all other export works relating to the said container. With this arrangement, on 19-3-2003, they filed a shipping bill, bearing No.1570116 in the name of M/s.Vatchala Enterprises for the export of a consignment of popcorn maize to Singapore.

(xiii) Adhikesavan further stated that though the name of his company, M/s. Vatchala Enterprises was to be found in the bill, he was in no way concerned with the seized consignment and that he had only lent his company□s name and the IMPEX Code for monetary consideration to Khaleel.

(xiv) That apart, the detenu himself had made a statement that for the past two years, he was exporting Agarbathis, onion and steel goods in the name of M/s.Genexpo Trading Company to Singapore, Malaysia and other countries. He also admitted that the goods in the said container were red sanders, which were stuffed in the said container and that he got a message from Khaleel that in the morning of 26.04.2003, popcorn maize was loaded into the container at Numbal CFS and was cleared. Even according to the detenu, he asked Abdul Lasa to wait near Kolathur Double Lake and on arrival of the trailer with the stuffed container, he was to exchange the goods therein as told by Khaleel and accordingly, after exchanging the goods, he was informed of the same by Abdul Lasa. The statement of the detenu further revealed that Khaleel was a trader in foreign goods at Burma Bazaar and Chennai Airport and that he owns a shop in Burma Bazaar, Chennai, and that about a month back, Khaleel had approached him to introduce the party having red sanders as he would arrange for the export of the same, which the detenu had accepted and arranged a party called Mathi, who had the red sanders. He also accepted to have taken Rs.50,000/- from Ganesan and it was at the instance of Khaleel, the further deals were arranged. The detenu also admitted that the amount seized viz., Rs.8,00,000/-, from his house represents the sale proceeds of the red sanders sent by him in March, 2003, that the popcorn maize loaded into the container was procured by Khaleel and that Abdul Lasa was working in his company, attending to his office works as per his instructions.

(xv) Thus, the detenu himself admitted that that he was deeply involved in smuggling of prohibited goods like red sanders and that he had done it systematically by tampering with the Customs seals and that he was benefited in that. From the materials gathered, the authorities came to the conclusion that the detenu knowingly indulged in smuggling prohibited goods and thereby, committed offences punishable under the Customs Act, and accordingly passed the impugned order of detention, questioning which, the Habeas Corpus Petition was filed.

5. Now, let us tersely refer to the contentions projected in the earlier petition and as to how the same were dealt with by the Division Bench in the earlier order dated 18.02.2004.

A. Firstly, by pointing out that the detenu was admitted in Hospital between 12.05.2003 and 14.05.2003, that being so, the remand was extended on 14.05.2003 till 28.05.2003, which means, at the time of extending the remand, the detenu was not in judicial custody but only in hospital; a contention was raised that there was utter non-application of mind on the part of the Detaining Authority to the vital fact that, while ordering extension of remand of the detenu, he was actually in Hospital.
The Division Bench, in the order dated 18.02.2004, on examining the records, found that since the detenu fell ill during his custody, he was sent to the hospital and treated as in-patient; and held that if the detenu was admitted as an in-door patient in the Hospital at the instance of the jail authority, he would always be deemed to be in the jail custody even if physically he was not inside the jail premises and that non-mentioning of the fact that he was in Hospital on 14.05.2003 would in no way vitiate the detention order since there is no dispute that the detenu was in the custody of the jail authorities.

B. Secondly, by stating that the detenu did not have working knowledge in English, it was argued before the Bench that non-supply of translated copies of document Nos.12 to 14 at page Nos.138 to 141 of the Paper-book along with grounds of detention within 15 days, would vitiate the detention order.

By pointing out that those documents have neither been relied on nor referred to, by order dated 18.02.2004, the Division Bench rejected the contention raised on the the ground that, in the representation submitted by the petitioner, he had dealt with the said documents, therefore, the claim that the detenu did not understand the contents of document Nos.12 to 14 was baseless.

C. Thirdly, while dealing with the submission that Section 3(1)(i) of COFEPOSA Act only attracts the offence relating to smuggling of goods and not abetting of such offence, the Bench, in the order dated 18.02.2004, by holding that the Government have only specified that the detenu had indulged in smuggling goods, and observing that the materials relied on by the Detaining Authority would go to show that the detenu had not merely abetted smuggling but he himself indulged in such offence, ultimately rejected the contention that the detenu is only an abettor and not the actual offender.

D. Fourthly, it was contended that non-furnishing of certain documents including the shipping bills would vitiate the detention order. Disagreeing with such contention, it was held by order dated 18.02.2004 that the documents sought for by the detenu were neither 'relied upon documents' nor 'referred to documents' and further, in any event, the detenu had not chosen to ask for any such document.

E. Fifthly, it was argued that the statements of Adhikesavan supplied to the detenu would establish that the detenu had no direct nexus to the smuggling activity and such statements were not placed before the Advisory Board. With reference to such argument, the Bench, in the order dated 18.02.2004, after analysing the materials, observed that even if a document comes into existence after passing of the detention order, the same should necessarily be placed before the Advisory Board provided it has some relevance to the detention and held that, if the matter is looked at in that perspective, there is nothing available in those statements to suggest that the earlier allegations made against the petitioner/detenu were falsified in any manner. So holding, the contention raised was discarded.

F. Sixthly, it was contended that the State Government failed to send the relied upon documents to the Central Government along with its report under Section 3 of the COFEPOSA Act. Referring to the statement made in the counter affidavit filed by the State Government to the effect that the copies of the detention order and the grounds of detention were sent to the Central Government as per the provisions of the COFEPOSA Act by speed post, and also the counter of the Central Government that it had considered the whole records sent by the State Government, the Bench declined to accept such contention by order dated 18.02.2004.

G. Finally, by pointing out that the last document in the case is dated 22.05.2003, on which date, the detention order was also passed, it was contended that, in such circumstances, the positive presumption would be that the said document was added only subsequently after the detention order was passed. The said contention was also rejected by order dated 18.02.2004, holding that merely because the last document is dated 22.05.2003, it does not mean that the same came to be added only after the detention order was passed and not before.

6. Despite the dismissal of earlier Habeas Corpus Petition in HCP No.908 of 2003 by such detailed order dated 18.02.2004, the petitioner had chosen to file the present Habeas Corpus Petition, raising three new grounds. The petition was admitted on 05.05.2004 and by order dated 10.12.2004, a Division Bench of this Court to which one of us (P.D.DINAKARAN, J.) was a party, dismissed the same and the operative portion of the order reads thus:-
" 2. Concededly, the detention period of one year had already expired on 21.5.2004. Therefore, the petitioner has no subsisting grievance. Consequently, the relief sought for in the above writ petition, in our opinion, had become infructuous. However, Mr.M.M.K.Alifudeen, learned counsel appearing

for the petitioner submits that the disposal of the present writ petition as infructuous would affect his rights to contest the confiscation proceedings, which are pending before the concerned revenue authorities. In our considered opinion, the above apprehension made on behalf of the detenu is unwarranted, misconceived and unsustainable in law. Therefore, except making it clear that the detenu is at liberty to work out his rights in the confiscation proceedings, if any, in a manner known to law, if he is so advised, no orders are required ..."

As against the said order, the detenu preferred Special Leave Petition before the Apex Court and the same was disposed of, setting aside the order of the Division Bench dated 10.12.2004 and remitting the matter back to the High Court for a decision on merits. Accordingly, the matter came to be listed before us for hearing and disposal.

7. Learned counsel for the petitioner raised three additional/new grounds and let us consider the acceptability or otherwise of the same with reference to the materials available on record, the factual aspects involved herein and the settled principles of law.

8. The first additional ground is that Khaleel, whose statement was very much relied on by the Detaining Authority for clamping the detention order on the detenu, died on 29.06.2003 and the fact relating to his death, being a vital information, was not placed before the Advisory Board for consideration, and therefore, non-placement of details relating to the death of Khaleel would vitiate the detention order.
We carefully considered the aforesaid submission. Admittedly, the death of Khaleel has been referred to in the statement, dated 10.07.2003, of Arokiasamy and, in fact, such aspect was dealt with by the earlier Division Bench in its order dated 18.02.2004. Further, the Division Bench, in the said order dated 18.02.2004, after going through the statements of Arokiasamy dated 12.06.2003 and 10.07.2003, rightly held that those statements have no relevance to the subject of detention. Non-placement of information as to the death of Khaleel furnished by Arokiasamy in his statement dated 10.07.2003 also stands on the same footing and hence the same is held to be not relevant to the subject of impugned detention. Accordingly, we reject the first contention as without substance.

9. The second additional ground was that the respondent/Detaining Authority is a manned agency with well-versant officials in procedure and law and that being so, the detenu ought to have been given an opportunity to seek the assistance of a legal practitioner or a friend, who is conversant with law and legal procedure. According to the learned counsel, the petitioner having been deprived of such valuable opportunity, there would not be any justification in allowing the detention order to stand against the detenu.
We hasten to comment that such a contention is not only misconceived but unsustainable in law in view of the ratio laid down by the Apex Court in A.K.Roy v. Union of India (AIR 1982 SC 710), which still holds the field. It would be quite useful to quote below the relevant portions from the said case law,

" 87. On a combined reading of clauses (1) and (3)(b) of Article 22, it is clear that the right to consult and to be defended by a legal practitioner of one□s choice, which is conferred by clause (1), is denied by clause 3(b) to a person who is detained under any law providing for preventive detention. Thus, according to the express intendment of the Constitution itself, no person who is detained under any law, which provides for preventive detention, can claim the right to consult a legal practitioner of his choice or to be defended by him. In view of this, it seems to us difficult to hold, by the application of abstract, general principles or on a priori considerations that the detenu has the right of being represented by a legal practitioner in the proceedings before the Advisory Board. Since the Constitution, as originally enacted, itself contemplates that such a right should not be made available to a detenu, it cannot be said that the denial of the said right is unfair, unjust or

unreasonable. It is indeed true to say, after the decision in the Bank Nationalisation 32, that though the subject of preventive detention is specifically dealt with in Article 22, the requirements of Article 21 have nevertheless to be satisfied. It is therefore necessary that the procedure prescribed by law for the proceedings before the Advisory Boards must be fair, just and reasonable. But then, the Constitution itself has provided a yardstick for the application of that standard, through the medium of the provisions contained in Article 22(3)(b). Howsoever much we would have liked to hold otherwise, we experience serious difficulty in taking the view that the procedure of the Advisory Boards in which the detenu is denied the right of legal representation is unfair, unjust or unreasonable. If Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards. It is unfortunate that courts have been deprived of that choice by the express language of Article 22(3) (b) read with Article 22(1).

88. It is contended by Shri Jethmalani that the provision contained in clause (3)(b) of Article 22 is limited to the right which is specifically conferred by clause (1) of that article and therefore, if the right to legal representation is available to the detenu apart from the provisions of Article 22(1), that right cannot be denied to him by reason of the exclusionary provisions contained in Article 22 (3)(b) . Counsel says that the right of legal representation arises out of the provisions of Articles 19, 21 and 22(5) and therefore, nothing said in Article 22(3)(b) can affect that right. In a sense we have already answered this contention because, what that contention implies is that the denial of the right of legal representation to the detenu in the proceedings before the Advisory Board is an unreasonable restriction, within the meaning of Article 19(1), on the rights conferred by that article. If the yardstick of reasonableness is provided by Article 22(3), which is as much a part of the Constitution as originally enacted, as Articles 19, 21 and 22(5), it would be difficult to hold that the denial of the particular right introduces an element of unfairness, unjustness or unreasonableness in the procedure of the Advisory Boards. It would be stretching the language of Articles 19 and 21 a little too far to hold that what is regarded as reasonable by Article 22(3)(b) must be regarded as unreasonable within the meaning of those articles. For illustrating this point, we may take the example of a law which provides that an enemy alien need not be produced before a Magistrate within twenty-four hours of his arrest or detention in custody. If the right of production before the Magistrate within 24 hours of the arrest is expressly denied to the enemy alien by Article 22(3)(a), it would be impossible to hold that the said right is nevertheless available to him by reason of the provisions contained in Article 21. The reason is, that the answer to the question whether the procedure established by law for depriving an enemy alien of his personal liberty is fair or just is provided by the Constitution itself through the provisions of Article 22(3)(a). What that provision considers fair, just and reasonable cannot, for the purposes of Article 21, be regarded as unfair, unjust or unreasonable.

89. To read the right of legal representation in Article 22(5) is straining the language of that article. Clause (5) confers upon the detenu the right to be informed of the grounds of detention and the right to be afforded the earliest opportunity of making a representation against the order of detention. That right has undoubtedly to be effective, but it does not carry with it the right to be represented by a legal practitioner before the Advisory Board merely because, by Section 10 of the National Security Act, the representation made by the detenu is required to be forwarded to the Advisory Board for its consideration. If anything, the effect of Section 11(4) of the Act, which conforms to Article 22(3)(b), is that the detenu cannot appear before the Advisory Board through a legal practitioner. The written representation of the detenu does not have to be expatiated upon by a legal practitioner.

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93. ....

94. We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu. In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. Permitting the detaining authority or the government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner. We are informed that officers of the government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not □legal practitioners□ or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them. Serving or retired Judges of the High Court will have no difficulty in understanding this position. Those who are merely □qualified to be appointed□ as High Court Judges may have to do a little homework in order to appreciate it."

In the instant case, the Detaining Authority has, in its counter affidavit, at paragraph No.5, clearly stated that 'in the grounds of detention itself, the petitioner has been advised that he can utilise the help of a friend other than a lawyer during the proceedings before the Advisory Board', and that the detenu and his assistant other than a lawyer were afforded with an opportunity to put forth the case, on the other hand, no official of either the detaining authority or the sponsoring authority was allowed to represent the Government. If that be so, the second contention shall also fall to ground.

10. The third and last additional ground raised was that the statement of Abdul Lasa dated 27.04.2003 was retracted by way of letter dated 29.04.2003, but, the same was not placed before the Detaining Authority.
We do not see any force or substance in this contention as well, because, in the bail application moved on 28.04.2003 itself, the said Abdul Lasa retracted his earlier statement given on 27.04.2003 and the said bail application was also dismissed. The copy of the bail application as well as the dismissal order were placed before the Detaining Authority and therefore, the authorities did not choose to rely upon the retracted letter dated 29.04.2003. Hence, the argument based on the retraction letter dated 29.04.2003 does not in any way help the case of the petitioner so as to weaken the rigour of the detention order.

11. Thus, finding no merit in the additional grounds raised by the petitioner, we dismiss the Habeas Corpus Petition as devoid of merits.

(PDDJ) (RRJ)
Index : yes. 26.02.2008.
Internet: yes.
JI.
To

1. Secretary to Government, State of Tamil Nadu
Public (Law & Order) Department, Fort St. George
Chennai 600 009.

2. Secretary to Government, Union of India,
Ministry of Finance, Department of Revenue (COFEPOSA Unit), Janapath Bhavan, IV Floor, New Delhi 110 001.

3. The Superintendent of Central Prison,
Central Prison, Chennai 600 003.

4. The Public Prosecutor, High Court, Madras.

P.D.DINAKARAN, J.
And
R.REGUPATHI, J.

H.C.P. No.585 of 2004

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